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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 819

DAVID H. RATNER,

Appellant,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee, Hoover Motor Express Co., Inc., pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, move that the final judgment of the district court be affirmed.

Statement

This is a direct appeal from a final judgment, entered on December 23, 1957, by a three-judge court convened pursuant to 28 U.S.C. 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission.

Appellee, Hoover Motor Express Co., Inc., is a Tennessee corporation and a common carrier for hire via motor

vehicles, operating in interstate and foreign commerce pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission. Appellee, Hoover, was a party to the proceedings before the said Commission, and before the District Court.

Extensive hearings lasting for more than a week, were held in connection with the application. The Examiner who heard the case recommended denial of the application. In passing upon the exceptions taken to the Examiner's Report, Division 4 of the Commission overruled the exceptions and likewise denied the application. Applicant thereupon filed a petition for reconsideration by the full Commission of the decision and order of Division 4, and this petition was also denied by the full Commission. The District Court rejected the arguments and contentions of appellant and dismissed the complaint.

Appellee respectfully submits that the appellant's appeal in this case fails to present a substantial question, and that the decision of the lower Court should be affirmed, and the appeal dismissed.

Argument

Appellant's entire case has been built upon a mere "play of words" and upon an extreme and unwarranted construction of one statement contained in the Commission's decision and to which reference is made in the District Court's decision. The District Court stated:

> "The report of the Commission contains the following, 'The burden of showing that the proposed coordinate operations would meet a public need and would be consistent with the public interest is upon applicant.' The use of these words in the order are unfortunate and do not correctly state the law, but should

this case be decided upon a mere play of words? The Court should not ignore the findings of the Commission that the proposed acquisition of control would create a new service in an area already adequately served by motor carriers, and that such a new service could draw additional traffic only from existing carriers to the detriment of said existing carriers. *Such a result may not properly be found to be consistent with the public interest.* The term 'public interest' as used in Section 5 clearly embraces the interest of competing carriers. Their interest and that of the general public is the same in preventing uneconomic transportation. The entry of plaintiff into the area would disrupt the competitive balance with harmful effect on the competing carriers *without compensatory benefits to the public,* and would not foster sound economic conditions in the industry. *Accordingly, the transaction has not been shown to be consistent with public interest.*" (Emphasis added) (Page 16a, Appendix, Appellant's Jurisdictional Statement)

At page 5 of his Jurisdictional Statement, appellant states:

"Briefly, the applicant, Ratner, sought to show that approval of the proposed transaction would be beneficial to Tomkins Motor Lines *and to the public* by reason of the fact that appellant has the managerial experience and the financial resources to restore the company to a sound position and to operate it successfully, thus assuring it continued operations. Eight witnesses representing shippers who utilize Tompkins' service testified in support of the application, expressing their interest in, and desire to have the service preserved." (Emphasis added)

Appellant wholly failed to prove his contentions, and the Commission made specific adverse findings relative thereto, all of which are abundantly supported by the evidence.

The Commission found, among other things:

1. That for the first three months of 1955 (prior to the instant transaction) Tompkins Motor Lines conducted a profitable and balanced operation,[1] and from all the proof found that it could continue to do so in the future. (Page 10a, Appendix, Appellant's Jurisdictional Statement) (Appellant states at page 4 of his Jurisdictional Statement that the company operated at a loss for the three year period 1952-1954. This does not take into account the uncontradicted proof that Mr. W. H. Tompkins had not actively managed the company, and was incapable of doing so, for approximately thirteen years and had delegated the active management to others (Tr. 1026-1032) or that he drew a salary of $15,000.00 a year for which he did nothing (Tr. 178, 809). Mr. Ratner, the appellant, admitted that, for example, for the year 1954 if Mr. Tompkins' salary were taken into consideration (since he did nothing to earn it) the company would have operated at a profit (Tr. 178)).

2. That the applicant failed to show that his overall management is required to continue satisfactorily the operations of Tompkins Motor Lines. (Page 10a, Appendix, Appellant's Jurisdictional Statement)

3. That prior to 1955 and the transaction involved herein, there was no substantial interline of traffic between the two carriers (Hayes and Motor Lines), but that the relationship changed considerably after the instant agreement. (Page 11a, Appendix, Appellant's Jurisdictional Statement)

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[1] A balanced operation, where the volume of freight handled is approximately equal in all directions, is the ultimate goal towards which all carriers continually strive.

4. That the testimony of applicant's supporting public witnesses failed to show a need or desire for any through service between the territories served by any of the carriers controlled by applicant and that served by Motor Lines. (Page 11a, Appendix Appellant's Jurisdictional Statement)

5. That applicant's evidence fails to show that existing carrier service in the area involved is inadequate, or that any new traffic is available, and that an alleged 25% increase in traffic could be generated is not substantiated by the evidence of record. (Page 11a, Appendix, Appellant's Jurisdictional Statement)

6. That the proposed coordinated service would be in direct competition with the existing carriers in the involved area, and that the operations of the protestants would be adversely affected thereby. (Page 12a, Appendix, Appellant's Jurisdictional Statement)

7. The Commission further found:

> "The instant agreement provided that applicant must accomplish the stock purchase regardless of the outcome of the instant transaction. It is difficult to see that this provision of the agreement can be accomplished without, at the same time, acquiring power to control Motor Lines, in violation of Section 5." (Page 13a, Appendix, Appellant's Jurisdictional Statement)

The statement by the Commission in its Report to the effect that the burden is upon the applicant to show that the proposed coordinated operations would meet a public need and would be consistent with the public interest is but another way of saying that (in view of its findings that the public witnesses did not indicate a need or desire of

the proposed through cooordinated service; the proof did not show that approval is required in order for the continuation of Motor Lines' service to the public; approval would have an adverse competitive effect upon the operations of the protestants) in order for the transaction to be consistent with the public interest, a public need must be shown, that is, some compensating benefits to the public which would overcome or offset the competitive adverse affect upon the operations of the protestants. This is true because, as held by the lower Court, the term "public interest" as used in Section 5 clearly embraces the interest of competing carriers.

The District Court held:

> "In McLean Trucking Co. v. United States, 321 U. S. 67, the Court discussed the history and development of Section 5 in general and its applicability to motor carrier consolidations. In the case the Court said 'Congress recognized that the process of consolidating motor carriers would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to make certain that the former was permitted only where appropriate to further the national transportation policy, it placed in the Commisssion power to control such developments. The national transportation policy requires the Commission to promote economical service and foster sound economic conditions in transportation and among the several carriers. The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends. Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the anti-trust laws in

no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.

In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving the considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.

The wisdom and experience of that Commission, not of the courts, must determine whether the proposed consolidation is consistent with the public interest. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function (meaning the court's function) to upset its order." (Pages 17a, 18a, Appendix, Appellant's Jurisdictional Statement)

It is respectfully insisted by appellee, Hoover Motor Express Co., Inc., that the District Court properly sustained the Report and Order of the Commission; that it properly refused to dispose of this case upon a "mere play

of words"; and, that the decision of that Court should be affirmed and the appeal dismissed.

Respectfully submitted,

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APPENDIX A

TITLE 49, U. S. Code:

National Transportation Policy

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12 and 13 of this title, by inserting before part I thereof (chapter 1 of this title) the following provision entitled 'National Transportation Policy:'

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings.

* * * * * * * *

Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned, or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the

Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others; (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

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MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on December 23, 1957, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The order (70 M. C. C. 251), issued pursuant to Section 5 (2) (b) of the Interstate Commerce Act, denied appellant's application for authority to acquire con-

trol of a motor carrier through purchase of its capital stock.

Appellant controls through stock ownership Hayes Freight Lines, Inc. and Service Transfer & Storage, Inc., which will be respectively referred to as "Hayes" and "Service." Hayes is authorized to operate as a regular route common carrier of general commodities in a wide area embracing Chicago and Detroit on the north; Cleveland and Pittsburgh on the east; Memphis and Nashville, Tennessee, on the south; and Davenport, Iowa, Quincy, Illinois, and St. Louis on the west. Service holds authority to operate as a regular route common carrier between Minneapolis, Minnesota, and Eau Claire, Wisconsin, on the north and west, and Milwaukee and Chicago on the east and south.

In 1955, appellant filed an application under Section 5 (2). (b) of the Interstate Commerce Act for approval of his purchase of all the outstanding capital stock of Tompkins Motor Lines, Inc., which will be called Motor Lines. This company is authorized to transport general commodities over regular routes between Nashville and Atlanta and between Nashville and Greensboro, North Carolina. It also holds irregular route authority to transport various specified commodities between Nashville and certain points or areas in North Carolina, South Carolina, Georgia, Alabama and Florida. The application was opposed by 26 motor common carriers, of whom seven later withdrew their opposition, and by rail carriers in eastern territory (J. St. 2a). The transcript of tes-

timony at the hearing comprises over 1500 pages, and 153 exhibits were received in evidence.

The protesting motor carriers urged, among other things, that in the past there has been very little interline operation (via the Nashville junction) between Hayes and Motor Lines; that grant of the application would bring under appellant's control carriers operating in 18 States,[1] and would effect a radical change in the nature of Motor Lines' present service; that the coordinated operations of Hayes and Motor Lines would divert from other carriers traffic moving in and out of the territory involved; that such diversion would make vulnerable substantial portions of the area in which the protesting carriers operate; and that their operations generally are marginal so that a loss of traffic might result in deficit operations (J. St. 6a–9a).

The examiner filed a report recommending denial of the application (J. St. 1a). On appellant's exceptions to his report, Division 4 of the Commission (with one Commissioner dissenting) found that numerous motor carriers, some of whom "are dependent to a considerable degree, on interline traffic for the continuance of their business", serve the areas involved; that the unified operation which would result from grant of the application would adversely affect protesting carriers; that the evidence showed no in-

[1] General commodities could then be transported by carriers under appellant's control between points as far removed as Minneapolis and Atlanta, and particular commodities could move in like manner all the way from southern Florida to Minneapolis.

adequacy in existing carrier service in the area served by Motor Lines or that new traffic is available, and no need for the through service proposed by the applicant; that grant of the application would bring a material change in the character of Motor Lines' service; and that such change "assuredly would result in diversion of traffic from the existing carriers" (J. St. 11a–12a). Based on these and other subsidiary findings, the Commission found that the proposed transaction "would not be consistent with the public interest" (*id.*, 13a). The full Commission denied a petition for reconsideration of the order denying appellant's applications (*id.*, 15a.)

The district court, in sustaining the Commission's order, said (J. St. 16a–17a):

> The Court should not ignore the findings of the Commission that the proposed acquisition of control would create a new service in an area already adequately served by motor carriers, and that such a new service could draw additional traffic only from existing carriers to the detriment of said existing carriers. Such a result may not properly be found to be consistent with the public interest. The term "public interest" as used in Section 5 clearly embraces the interest of competing carriers. Their interest and that of the general public is the same in preventing uneconomic transportation. The entry of plaintiff into the area would disrupt the competitive balance with harmful effect on the competing carriers without compensatory benefits to the public, and would not foster sound economic conditions in the industry.

Accordingly, the transaction has not been shown to be consistent with public interest.

ARGUMENT

Section 5 (2) (a) of the Interstate Commerce Act makes it lawful for a person not a carrier to acquire control of two or more carriers if the acquisition is approved by the Commission as provided in Section 5 (2) (b). That section provides that the Commission shall authorize an acquisition of control coming within the scope of 5 (2) (a) if it finds that the acquisition will be "consistent with the public interest". Appellant's contention that the Commission misinterpreted the statute is grounded on the following sentence in the Commission's report (J. St. 12a–13a): "The burden of showing that the proposed coordinated operations would meet a public need and would be consistent with the public interest is upon applicant". Appellant contends that when the Commission said that "public need" had to be shown, it erroneously applied a "public convenience and necessity" test instead of the statutory test of "consistent with the public interest" (J. St. 7, 11–13, 15).

Resolving the various considerations determinative of the public interest in a proceeding under Section 5 (2) (b) is a "complex task" requiring "expert judgment and considerable knowledge of the transportation industry", and "Congress left that task to the Commission". *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87. Accordingly, the courts may not upset an order entered under that section if the Commission "did not exceed the statutory limits

within which Congress confined its discretion and its findings are adequate and supported by evidence". *Id.*, at 88.

In the instant case, the Commission found that bringing Motor Lines under common control with the two other motor carriers controlled by appellant would result in what was tantamount to the institution of a new service by Motor Lines, and that this change would have a substantial adverse effect on its competitors. These findings furnish ample warrant for the Commission's determination that the proposed acquisition was not consistent with the public interest, at least in the absence of proof that Motor Lines, by virtue of a change in control, would supply some transportation service useful to shippers and not presently available to them—in short, that its new operations "would meet a public need". Appellant had the burden of showing that the proposed acquisition of control would be consistent with the public interest. In view of the evidence and findings of adverse effect on other carriers, he did not sustain this burden when he failed to show that the change in Motor Lines' operations resulting from acquisition of control "would meet a public need". Certainly the Commission, being vested with wide discretion in determining the factors relevant to what is "consistent with the public interest", could give weight to absence of proof of any advantage flowing to shippers from the changed character of operations ensuing from bringing Motor Lines under appellant's control.

In circumstances like those here, the courts have repeatedly held that the Commission may validly re-

ject a proposed acquisition of control upon the ground that public need for the service resulting from the proposed acquisition had not been shown. *Shein* v. *United States,* 102 F. Supp. 320, 326 (D. N. J.), affirmed, 343 U. S. 944, held that the Commission had properly applied the statute when it gave as grounds for finding a proposed acquisition not consistent with the public interest that it would bring about a radical change in the pattern of prior operations, that it probably would adversely affect competitors, and that the evidence failed to show that the acquisition would supply "any need of the public not now being adequately met by other carriers". Similarly in *Houff Transfer* v. *United States;* 105 F. Supp. 851, 854–856 (W. D. Va.), the court held that the Commission had properly concluded that the acquiring carrier's desire to institute what essentially would be a new service, "unsupported by any evidence of the need therefor", does not establish that the transaction is consistent with the public interest. In *Herrin Transportation Co.* v. *United States,* 108 F. Supp. 89, 93 (E. D. La.), affirmed, 344 U. S. 925, rehearing denied, 345 U. S. 914, the grounds given by the Commission for rejecting the Section 5 (2) (b) application were that "no need has been shown for the additional service" proposed, and that the disadvantages resulting from approval of the transaction outweigh the possible benefits. The court held that determination of what is consistent with the public interest, in the light of these opposing considerations, is "peculiarly within the province of the Commis-

sion", and that its order had "a rational basis in adequate findings."

Appellant relies (J. St. 11–14) on two decisions which hold that an order approving an acquisition of control is not invalidated by the absence of a finding *in haec verba* that there is a "public need" for service of the kind which the acquisition would make available. *M. & M. Transportation Co.* v. *United States,* 128 F. Supp. 296 (D. Mass.), affirmed, 350 U. S. 857; *Anderson Motor Service* v. *United States,* 151 F. Supp. 577 (E. D. Mo.). In each of these cases, the Commission found that the proposed operations would provide better service for the public,[2] and it also found that the acquisition would have no appreciable adverse effect on competitors (128 F. Supp. at 300; 151 F. Supp. at 581). We submit that plainly there is no conflict between these decisions and the decision below. In the first place, proof that grant of an application will make available additional or better service for which there is public demand may be essential to a determination that the grant will be "consistent with the public interest" if the proposed service constitutes a serious threat to competitors, but not essential if there is no such threat. In the second place, in the cited cases the Commission in effect

[2] In *M. & M.* the Commission found that the applicant proposed to provide "a unified service, operating more efficiently", and an overnight through service between certain points "in response to the requests of shippers". 128 F. Supp. at 300. In *Anderson* the Commission found that "an improved and more efficient service to the public would result from the proposed transaction". 151 F. Supp. at 581.

found that the applicant had shown that there existed a public need for the service proposed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

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APRIL 1958.

U. S. GOVERNMENT PRINTING OFFICE, 1958